for special reasons thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a driving licence for a period of twelve months from the date of the conviction.".

The modern doctrine of the interpretation of penal statutes is well set out in *Maxwell* 7th edition page 244 :—

". . . . The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.".

There is in regulation 3(2) a possible *casus omissus*. The regulation appears to have been copied from section 51(2) of the F.M.S. Traffic Enactment. In that Enactment the power of the Court to order a longer period is contained in section 20. (The corresponding sections of the United Kingdom Road Traffic Act, 1930, are sections 35(2) and section 6).

Up to 14th March 1946 the provisions of section 20 of the Traffic Enactment relating to disqualification were probably still in force but when British Military Administration Proclamation No. 69 was published on that day the Traffic Enactment was repealed in so far as it related to motor vehicles. The Motor Vehicles Third Party Regulations were not signed until 21st March and were gazetted on 30th March 1946.

A recent authority on interpretation of statutes is the House of Lords decision in *Magor & St. Mellons Rural District Council v. Newport Corpn.*[3] the headnote of which reads :—

"In the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature.".

Lord Morton of Henryton said :—

". . . . In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.".

Applying these principles to the regulation before this Court it is clear that one must not look outside the Road Transport Proclamation and the Regulations in order to interpret this particular regulation. The F.M.S. Traffic Enactment cannot supply any missing powers because it was repealed a few days before the Regulations were made. On the other hand one must not say that because the model upon which the regulation is based has not been fully followed and in consequence the words "the power of the Court" have nothing antecedent or subsequent to which to refer one must reject the words *in toto*. The intention of the passage must be discovered from the language used. If the intention is manifest or revealed by necessary implication effect must be given to the intention.

The intention of this regulation appears to be that every person who is found to have acted in contravention of the regulation, whether convicted thereof or not, shall automatically be disqualified for a period of twelve months. The Court has power to modify this statutory automatic period of disqualification in two ways :—

(1) when satisfied that special circumstances exist, by ordering a shorter period of disqualification or even no disqualification at all; and

(2) by ordering a longer period of disqualification.

We therefore agree with Buhagiar J. that the Court has power to vary the twelve-month automatic period of disqualification.

With reference to the point submitted by the learned Public Prosecutor, it follows that the Court has power to order disqualification for a period less than twelve months or to dispense with disqualification for special reasons and to order disqualification for a period longer than twelve months. There is no necessity for the Court to order disqualification for a period of twelve months since such disqualification is automatic.

This Court sees no reason on the facts of this case to interfere with the order made by the learned Magistrate.

Order accordingly.

Solicitors : *Shearn, Delamore & Co.*

DOROTHY YEE YENG NAM v. LEE FAH KOOI

[O. C. J. (Thomson J.) August 16, 1956]

[Ipoh — Divorce Suit No. 1 of 1956]

Divorce Ordinance, 1952, s. 4(1)(a) — Marriage contracted under a law providing that or in contemplation of which marriage is monogamous — Whether a Chinese domiciled in Perak can enter into a monogamous marriage — Whether the Straits Settlement Christian Marriage Ordinance, 1940 is a law providing that or in contemplation of which marriage is monogamous.

Marriage — Status — Locus contractus — Personal law — Monogamous and polygamous marriages distinguished — Power to contract irrespective of law of domicile.

In this case the parties were married in Penang in accordance with the provisions of the Straits Settlements Christian Marriage Ordinance, 1940 and thereafter set up their matrimonial home and lived in Perak. It appeared on the facts that since October 1950 the respondent had deserted the petitioner without cause. The petitioner applied for dissolution of the marriage. The question was considered as to whether the Court had power to give the petitioner the decree because of section 4(1)(a) of the Divorce Ordinance, 1952 which reads: "Nothing herein shall authorise the Court to make any decree of dissolution of marriage except — (a) where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous . . . ."

Held: (1) a Chinese domiciled in Perak can validly enter into a monogamous form of marriage; (2) although the Christian Marriage Ordinance, 1940 does not expressly provide that a marriage under it is monogamous, it is a law enabling the parties to enter into a marriage which they contemplate or intend shall be monogamous; (3) therefore a Chinese married under that Ordinance can apply for dissolution of marriage under the Divorce Ordinance, 1952.

Apart from any question of capacity but otherwise irrespective of the law of their domicile parties may voluntarily agree to contract and then proceed to contract a marriage of any sort which is recognized by law of the *locus contractus* and thereby confer each upon the other the status which the law of the *locus contractus* confers upon the parties to such a sort of marriage.

The fact that a man's personal law permits him to enter into polygamous unions does not necessarily mean that he cannot contract one which at any rate at its inception is monogamous; nor does the fact that his personal law restricts him to a monogamous union prevent him from entering into a polygamous union provided the law of the *locus actus* permits it. He can do anything the law does not prohibit. So long as he does nothing that the law of the *locus actus* forbids he can agree to confer and can confer upon his wife the status of a monogamous wife or that of a polygamous wife.

Cases referred to:—

(1) *Thapita Peter v. Thapita Lakshmi* I.L.R. 17 Mad. 235.

(2) *Khoo Hooi Leong v. Khoo Chong Yeok* (1930) S.S.L.R. 127; (1930) A.C. 346, 352.

(3) *Khoo Hooi Leong v. Khoo Hean Hwee* (1926) A.C. 529, 543; 2 B.L.S.S. 447.

(4) *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130.

(5) *Re Choo Eng Choon decd. (Six Widows Case)* 12 S.S.L.R. 120.

(6) *Cheang Thye Phin v. Tan Ah Loy* (1920) A.C. 369; 2 B.L.S.S. 510.

(7) *Bethell v. Hildyard* 38 Ch. D. 220.

(8) *Chia Teck Leong v. Estate & Trust Agencies (1927) Ltd.* (1939) M.L.J. 118; (1939) S.S.L.R. 94, 102.

(9) *R. v. Davendra* 1 M.C. 51, 55.

(10) *R. v. Teo Kim Choon* (1948) M.L.J. 145.

(11) *Khambatta v. Khambatta* I.L.R. 59 Bom. 278.

(12) *Public Prosecutor v. White* (1940) M.L.J. 214, 215.

(13) *Kenward v. Kenward* (1950) 2 All E.R. 297, 309.

(14) *Mehta v. Mehta* (1945) 2 All E.R. 690.

(15) *Lopez v. Lopez* (1886) I.L.R. 12 Cal. 706.

(16) *Saldanha v. Saldanha* A.I.R. 1930 Bom. 105.

(17) *Baindall v. Baindall* (1946) P. 123.

(18) *Warrender v. Warrender* (1835) 2 Cl. & F. 488.

(19) *R. v. Hammersmith Superintendent Registrar of Marriages; ex parte Mir Anwaruddin* (1917) 1 K.B. 634, 645, 646.

(20) *Chetti v. Chetti* (1909) P. 67, 78, 87.

(21) *Risk v. Risk* (1950) 2 All E.R. 973.

(22) *Maher v. Maher* (1951) 2 All E.R. 37, 39.

(23) *Peal v. Peal* (1931) P. 97, 99.

(24) *R. v. Maha Ram* (1918) I.L.R. 40 All. 393, 404.

PETITION FOR DIVORCE.

M. S. Mahendran for petitioner.

H. T. Ong, amicus curiae.

Thomson J. : — This petition raises a question of importance and some small difficulty as to the provisions of the Divorce Ordinance, 1952, which came into force on 1st April, 1953.

The petition is undefended and there is no controversy as to the facts. The Petitioner who is a Chinese is and at all material times was a Christian. She and the respondent who is also a Chinese and a Christian have been at all material times domiciled in Perak.

On 6th December, 1941, the parties were married in Penang in accordance with the provisions of the Straits Settlements Christian Marriage Ordinance, 1940, and thereafter set up their matrimonial home and lived in Perak.

In October, 1950, the respondent left the Petitioner and went to Hong Kong. Since then he has lived in Hong Kong and Macao and I do not find

it necessary to discuss the evidence any further than by observing that on it I am satisfied that in October, 1950, he deserted the Petitioner without cause and that his desertion has continued ever since.

On 17th March, 1955, that is to say after desertion had continued for well over three years, the Petitioner presented her petition claiming dissolution of the marriage and custody of the only child of it.

At the hearing of the petition I was in considerable doubt as to whether the Court had power to grant the Petitioner the decree to which she would otherwise have been entitled because of section 4(1)(a) of the Divorce Ordinance, 1952, which reads as follows:—

"4. (1) Nothing herein shall authorise the Court to make any decree of dissolution of marriage except—

(a) where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous."

As the point seemed to me to be of great importance and to affect the position of large numbers of Chinese domiciled in the Federation who have been married either under the Straits Settlements Christian Marriage Ordinance or under the corresponding Enactment in the Federation I adjourned the hearing to give counsel for the Petitioner an opportunity to consider the point. I also invited Mr. H. T. Ong, a Chinese member of the Bar of very wide experience, to appear at the adjourned hearing as *amicus curiae* and I take this opportunity of expressing my appreciation of the very helpful arguments to which I have listened from both counsel.

The parties being domiciled here the question of whether they are entitled to divorce must of course depend on the local law which is contained in the Divorce Ordinance, 1952, but in view of the provision of that law which has been quoted it becomes necessary to examine the law of the Straits Settlements at the date of the marriage which was 6th December, 1941, because it was under that law that the marriage was contracted. In that connection it is necessary to examine not only the Straits Settlements law as to marriage but also the law of the Settlements as to divorce not because the rights of the parties depend in any way upon that law but by reason of the light it throws upon the meaning of the marriage laws.

The statute law of the Straits Settlements relating to marriage was in its origin based on the statute law of British India on the same subject. It is not I think necessary to consider in detail the whole history of the Straits law and the law in British India. Suffice it to say that immediately prior to 1940 the only statute relating to marriage in force in the Straits Settlements was the Christian Marriage Ordinance (Chapter 82 in the 1936 Edition).

That Ordinance followed very closely the provisions of the Indian Christian Marriage Act (No. XV of 1872) which replaced earlier legislation in India and which is clearly, to some extent, based on the English Marriage Act of 1836.

The Ordinance contained elaborate provisions relating to the solemnization of marriages by Christian clergymen and by Registrars of Marriages, who were required by section 6(1) to be persons professing the Christian religion. Section 3, which was the same as section 4 of the Indian Act, provided as follows:—

"Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with section 4, and any such marriage solemnized otherwise than in accordance with such section shall be void."

It is also to be noted that section 71, which is the same as section 88 of the Indian Act, provided as follows:—

"Nothing in this Ordinance shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

That Ordinance was repealed and was replaced with effect from 1st January, 1941, by the Civil Marriage Ordinance, 1940, and the Christian Marriage Ordinance, 1940. Since 1st January, 1955, the Straits Civil Marriage Ordinance has been replaced in Penang by Federation of Malaya Ordinance No. 44 of 1952 but to all intents and purposes the two Ordinances are the same.

The Civil Marriage Ordinance enables persons, other than Muslims, to have their marriage solemnized before Registrars of Marriages (who are not required to be Christians) and contains provisions to be discussed at a later stage which make it very clear that marriages celebrated under it are monogamous in the sense of excluding any contemporaneous marriage between either of the parties and any third person.

The Christian Marriage Ordinance, 1940, is very similar to the earlier Christian Marriage Ordinance which it replaced the main difference being that it omits the provisions of the former relating to marriage before Registrars of Marriages, no doubt because of the enactment of the Civil Marriage Ordinance. Section 3 now reads as follows:—

"Every marriage between Christians and every marriage between persons one of whom is a Christian shall be solemnized in accordance with the provisions either of this Ordinance or of the Civil Marriage Ordinance, 1940, and every such marriage solemnized otherwise than as provided in this section shall be invalid."

It is to be noted that the Christian Marriage Ordinance does not contain any provision corresponding to sections 4, 5 and 6 of the Civil Marriage Ordinance providing in terms that any marriage contracted under it shall be monogamous. On the other hand it is of importance to note that it does not contain any provision

corresponding to section 71 of the earlier Ordinance saving the personal law applicable to the parties.

The law relating to divorce in the Straits Settlements is contained in the Divorce Ordinance (Chapter 84 of the 1936 Edition) which was based on the Indian Divorce Act (No. IV of 1869) and which was amended with effect from 1st July, 1941, by Ordinance No. 39 of 1939.

That Ordinance commences by providing (section 3), as does section 3 of the Federation Ordinance, that the Court shall give matrimonial relief "on principles which in the opinion of the Court are, nearly as may be, conformable" to the principles under which the Divorce Court in England acts and gives relief.

Then prior to its amendment in 1939 there was a provision (section 4) that nothing in it should authorise the Court to grant any remedy in the way of divorce or nullity "except where the petitioner professes the Christian religion." Thus in the case of a marriage under the Christian Marriage Ordinance where only one of the parties was a Christian the non-Christian party had no right to petition for divorce or nullity. It is to be noted that this originally was also the position in India under Act No. IV of 1869, but that Act was amended in 1927 (by Act No. XXX of 1927) so as to enable the Court to grant divorce or decree of nullity where either the petitioner or the respondent professed the Christian religion.

Sections 5(2) and 9 provided (and still provide) that a wife can obtain divorce on the ground that since the solemnization of her marriage the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman. It is, however, to be noted that prior to the 1939 Ordinance this in effect only applied where both parties were Christians at the time of the solemnization of the marriage for by reason of section 4 there could be no divorce on the petition of a non-Christian spouse.

Section 13 deals with grounds on which a decree of nullity can be made and gives as one of them that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then "in force".

The amending Ordinance of 1939 made two important changes in the existing law.

In the first place it replaced the provision of section 4 that the Court could only grant divorce or decree of nullity where the petitioner professed the Christian religion by a provision, corresponding to section 4(1) of the present Federation Ordinance, to the effect that nothing shall authorise the Court to make any decree of dissolution of marriage or nullity except:—

> "Where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous."

I pause here to observe that it is very difficult to see any point either in this section or the section it replaced. Section 3 providing that the Court is to act on the same principles as the English Divorce Court is in effect the same as section 7 of the Indian Divorce Act of 1869 and it had long been settled law in India that having regard to that section the marriage contemplated by the Indian Act were those founded on the Christian principle of a union of one man and one woman to the exclusion of others and that consequently the Act did not contemplate relief in the case of non-monogamous marriages. (See *Thapita Peter v. Thapita Lakshmi*[1]).

Then section 13 was amended by making it clear that the provision that a decree of nullity should be procured where the former husband or wife was living at the time of the marriage and the marriage with such husband and wife was then in force should apply where the former husband or wife was a husband or wife "by virtue of a marriage contracted under either a monogamous or a polygamous system of marriage laws."

Up to a point the position is tolerably clear. Prior to 1941, only a spouse who was a Christian could petition for divorce or a decree of nullity. If a Christian husband abandoned his religion and contracted a polygamous marriage that was available ground for divorce irrespective of any question of adultery but only if the wife was a Christian, for only a Christian could petition. Again a pre-existing marriage was ground for a decree of nullity. This may only have been the case when the pre-existing marriage was monogamous, a point on which the subsequent amendment raises doubts, but I do not find it necessary to discuss the point here. The real point is that the legislature would seem to have regarded any marriage where one of the parties was a Christian as so essentially monogamous that from its inception it was a nullity if either of the parties was already married to another party when it was solemnized. It may be further that the legislature assumed that there could be no marriage where one of the parties was a Christian except a marriage solemnized in accordance

with the Christian Marriage Ordinance but if so it will be seen from certain authorities which will be discussed later that any such assumption was of very doubtful validity.

Ex facie these various statutory provisions can lead to very different conclusions.

On the one hand it can be said that the Straits Legislature considered the whole question of marriage in 1940 and that the two Ordinances of that year are to be read together. One of them, the Civil Marriage Ordinance, contains provisions making it clear that any marriage contracted under it is monogamous. The other, the Christian Marriage Ordinance, contains no such provisions and their omission might well be said to point to the conclusion that the legislature did not contemplate marriage under that Ordinance as being necessarily monogamous.

On the other hand, the amendment to section 4 of the Divorce Ordinance which would seem to be connected with the 1940 Marriage Ordinances may be construed as an indication that the legislature regarded marriage under the Christian Marriage Ordinance as monogamous or rather that it intended the new formula not to deprive Christians married under the Christian Marriage Ordinance of their pre-existing rights to divorce but rather to extend these rights to non-Christians married under that Ordinance as had been done in India in 1927 and also to persons availing themselves of the new form of marriage provided by the Civil Marriage Ordinance.

Turning now from the consideration of the statutes, there is no room for doubt that in the former Straits Settlements the law permits a system of polygamy among persons of Chinese race irrespective of their nationality or place of domicile. No doubt at some time the Courts will have to re-consider the matter in the light of the Civil Code of the Republic of China of 1931 and in the light of legislation by the present Government of China. Nevertheless, the position as at present recognised by the Courts is that a Chinese man may marry a principal wife and any number of secondary wives. As was said by Lord Russell of Killowen in the second *Petronella case* (*Khoo Hooi Leong v. Khoo Chong Yeok*[2]) "polygamy amongst the Chinese is recognised by the Courts of the Colony." It is all very well to say as was said by the Privy Council in the first of the *Petronella cases* (*Khoo Hooi Leong v. Khoo Hean Hwee*[3]) that the union between the husband and each of the secondary wives is "a special kind of union". It is certainly not a monogamous marriage within the classical definition given by Lord Penzance in the case of *Hyde v Hyde*[4] "as the voluntary union for life of one man and one woman to the exclusion of all others". It is, I think, impossible to draw any distinction between such a union as was recognised in the *Six Widows Case*[5] and in the case of *Cheang Thye Phin v. Tan Ah Loy*[6] and similar unions among the Baralong people as described in the case of *Bethell v. Hildyard*[7]. Nevertheless, by any possible test it is a marriage. It is the union of a man and a woman which at its inception is intended to be permanent; the children of the union are legitimate and enjoy rights of succession; the parties entering into it are not guilty of the criminal offence of bigamy. But all that does not take us beyond the not very helpful proposition that a polygamous marriage is not a monogamous marriage The two things are different.

The real question at issue is the effect of the Christian Marriage Ordinance where persons of Chinese race are married under it. On this point, the authorities are by no means easy to reconcile.

In *Khoo Hooi Leong v. Khoo Hean Hwee*[3], *supra,* it was held by the Privy Council that there was nothing in the Christian Marriage Ordinance which prevented a Christian woman who was not of Chinese race becoming a Chinese secondary wife. Lord Phillimore said (at page 543):—

> "No question of the law of the Straits Settlements as to Christian marriages arises.
>
> If the woman be free to contract marriage, soluta, and the man according to his personal law is also free, solutus, and the particular class of marriage or union is in the abstract recognized by the law of the land, it may well be that the religious obstacle is no bar."

In the case of *Chia Teck Leong v. Estate and Trust Agencies (1927) Limited*[8] Horne J. said with reference to the Indian Christian Marriage Act which was the relevant statute in the Straits Settlements at the time in question in that case:—

> "The Act certainly penalises a Christian to the extent that if he or she enters into a connubial union, it will be void as a marriage, in the Christian or monogamous sense, unless solemnized in accordance with the Act. Accordingly if this law was applied in a Christian country which gave no legal recognition to polygamy (as is the case in England) it would have the effect of making void any alleged marriage solemnized not in accordance with it. But in this Colony where for certain purposes legal recognition has for many years, and even prior to 1889, been given to polygamy, it is difficult to place that interpretation upon it; and it cannot be used to say that, because the plaintiffs cannot establish a Christian marriage, they therefore cannot establish a polygamous marriage, valid in this Colony. So far as I understand the matter the Indian Act and the present

Ordinance only regulate Christian marriages, that is marriages as understood in Christendom, and has no effect upon Chinese marriages."

Then there are three bigamy cases which have a bearing on the point.

In the case of *Rex v. Davendra*[9], the accused was a Jaffna Tamil who being then of the Hindu religion married a Hindu woman in Ceylon under the provisions of the Ceylon Marriage Registration Ordinance, 1907, and also by Hindu ceremonies. Subsequently he came to Singapore, was admitted to the Roman Catholic Church and went through a ceremony of marriage according to the rites of that Church, with another woman. In his charge to the jury Bucknill C.J. laid it down that the conversion of a Hindu to Christianity does not affect the validity of a marriage properly effected by Hindu rites prior to his conversion and that if he subsequently purports to marry another woman according to Christian rites such marriage is null and void. His Lordship said :—

"If a man not a Christian but married by legally recognized ceremonial of his faith joins the Christian religion and is duly baptised, he does not by his change of faith dissociate himself from his first marriage and should he, whilst this first wife is alive, go through another ceremony of marriage with another woman under the rites of the Christian Church, such an act is bigamous and is an offence against our Code."

In the case of *Rex v. Teo Kim Choon*[10], the accused who was a Chinese Christian married a woman in Kuala Lumpur by Chinese custom. Later in Singapore he married another woman under the Christian Marriage Ordinance and Brown J. held that by reason of section 3 of that Ordinance the earlier marriage by Chinese custom was not a valid marriage. This decision is clearly in direct conflict with those in *Chia Teck Leong's* case *supra* and in *Davendra's* case *supra* but it should be pointed out that neither of these cases was cited in argument nor was the Indian case of *Khambatta v. Khambatta*[11].

In the F.M.S. case of *Public Prosecutor v. White*[12] the accused who at the time was a Christian married a Christian woman at Taiping according to the rites of the Church of England under the F.M.S. Christian Marriage Enactment the terms of which are the same as the pre-1940 Straits Christian Marriage Ordinance. Later he was converted to the Mohammedan religion and married a second Christian woman, who also became converted to that religion, by Mohammedan rites. In convicting the accused, Horne J. held that the first marriage was a monogamous one and must have held as a necessary corollary, although he did not say so, that the second marriage was void.

In this case His Lordship based himself upon a conception of what he called "the law of the marriage". He held that marriage under the F.M.S. Christian Marriage Enactment was a monogamous marriage giving the parties the status conferred by such a marriage and that "one of the legal incidents thrown about that status by the laws of the Federated Malay States is that the parties to such a marriage are during its subsistence precluded from marrying anyone else." He recognized that it was possible in the Federated Malay States for persons to enter into polygamous marriages and said :—

"I am therefore bound to hold and so to direct myself that as monogamous and polygamous marriages are recognized by the civil law, a man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot, therefore, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognized form of marriage with another woman."

For myself, I would deal with the matter as follows.

Marriage is a matter of status arising from a contract the terms of which are determined by law. The parties agree to marry and when that contract leads to the solemnization of the marriage then each of them acquires the status of a married man or a married woman with all the incidents which the law attaches to that status. In contracting to enter into the relationship the parties must be held to have agreed to acquire all the rights and submit themselves to all the liabilities which the law attaches to the status they have acquired. The point is thus put very compendiously in the following passage from *Eversley* on "Domestic Relations" (6th Edition page 1) :—

"Marriage is more than a contract, it is a status, the conditions of which are regulated for and not by those who enter into it. When the marriage is perfected, the semblance of a mere contract is at an end."

And again in the following passage from *Lush* on "Husband & Wife" (4th Edition page 31) :— .

"Marriage is a contract whereby a voluntary status is created, that is, the marriage contract operates *in rem;* there are impliedly attached by law various consequences that arise from the contract independent, may be in contravention of, the will of either or both parties."

It is not, of course, open to the parties by private agreement to modify or vary these conditions of the marriage in any way but these conditions may vary according to the personal law of the parties. As was said by Denning L.J. in the case of *Kenward v. Kenward*[13] :—

"The personal law of one party may attach a fundamental condition to marriage which does not exist in the personal law of the other, and, if he marries on the basis that that fundamental condition will apply, then it would be most unjust to hold him to the marriage after the condition has been broken or has failed. It all depends on whether the parties marry on that basis or not. If they do, then you may find that a marriage, although valid by the local law, is voidable by reason of a condition imported by the personal law of one of the parties."

Now there is room for some confusion of thought on this question of personal law. The general principle of private international law as recognized in England is that a person's personal law depends on his domicile, that is to say it is the law of the civil society to which he belongs for the time being. In the case of persons domiciled in India, however, the question of a person's personal law depends in its turn on the question of the religious society to which he belongs. The personal law of a Hindu is different from that of a non-Hindu and, as regards questions of marriage at any rate, may well differ according to the sect of Hinduism to which the individual belongs. (See *Mehta v. Mehta*[14]). In India, indeed, the local Courts, and it is for the local Courts to say what is the local law, have gone so far as to hold that even so far as Christians are concerned there is no single personal law but the personal law may vary according to the particular religious society to which a person belongs. In connection with the question of prohibited degrees, for instance, it would seem that the law applicable to Roman Catholics is different from that applicable to members of other religious societies and even in the case of Roman Catholics the law is not the general Canon Law but the law of the Roman Catholic Church as applied in India. (See *Lopez v. Lopez*[15]; *Saldanha v. Saldanha*[16]).

In the Straits Settlements, however, whatever may be the position as regards other races, the only conclusion that can be drawn from the *Six Widows Case supra,* which is the classical case on the subject, is that as regards Chinese the question of personal law is based on race. The Courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race and it would seem that the case is the same in those portions of the present Federation which were not formerly part of the Straits Settlements or, perhaps more accurately, which were part of the former Federated Malay States.

Now it is certainly not true to say that in England the law does not recognize polygamous marriage in the case of persons whose personal law, in the sense of the law of their domicile, permits polygamy. What is true is that the English Divorce Court will not grant any matrimonial remedy in respect of a polygamous marriage. Such as was pointed out by Lord Greene, M.R., in the case of *Baindall v. Baindall*[17] is the true construction to be placed upon the case of *Hyde v. Hyde supra* where Lord Penzance said :—

"All that is intended to be here decided is that as between each other '(the parties)' are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

Generally speaking, the validity of a marriage is to be determined according to the law of the place where it is entered into while, again generally speaking, the capacity of the parties to marry is to be determined according to their personal law which will generally be the law of their domicile.

But as was pointed out by Lord Brougham in the case of *Warrender v. Warrender*[18] a Christian or monogamous marriage and a polygamous marriage as recognized in countries where polygamy is lawful are entirely different things. The status which the parties confer upon each other is entirely different and the conditions attaching to that status are entirely different. This is clearly what Horne J. had in mind in *Public Prosecutor v. White supra* when he spoke of the "law of the marriage". The most useful point of differential diagnosis is the question of *consortium.* Under the law of England a married woman has an absolute right to the *consortium* of her husband to the exclusion of all other women. Under the law of India, at any rate prior to recent legislation, where the parties were Hindus belonging to a sect whose tenets permitted polygamy the right to *consortium* was not exclusive. Under the modern law of Russia (as discussed in *Kenward v. Kenward, supra*) if there be a right to *consortium* it is certainly not absolute.

Neither on principle nor on authority can I see any objection to the proposition that apart from any question of capacity but otherwise irrespective of the law of their domicile parties may voluntarily agree to contract and then proceed to contract a marriage of any sort which is recognized by the law of the *locus contractus* and thereby confer each upon the other the status which the law of the *locus contractus* confers upon the parties to such a sort of marriage. It is clearly a question of intention in each case. I base

that proposition on a number of cases which I shall proceed to discuss.

In *Mir-Anwaruddin's* case (*Rex v. Superintendent Registrar of Marriages, Hammersmith*[19]), a Muslim domiciled in India had contracted a civil marriage in England with an English woman. Subsequently in India he divorced his wife under Muslim law by a declaration of "talak". Later he returned to England and applied to a Superintendent Registrar of Marriages for a certificate and licence to marry another woman under English law.

Both the Divisional Court to which he went for a *mandamus* and the Court of Appeal held that although a declaration of "talak" was a proper mode of effecting the dissolution of a Muslim marriage according to Muslim law it could not dissolve a marriage solemnized in England according to English law between a Muslim domiciled in India and a Christian woman.

Much that was said in this case has no bearing on the present case, but in the Divisional Court Darling J. pointed out (at page 645) that the appellant might in England in the mosque at Woking have contracted a marriage in the Muslim form and sense. He went on to say (at page 646):—

"It is to be observed that Dr. Mir-Anwaruddin tells us that by the Mohammedan law it is permissible to him to have four lawful wives. In my opinion the domicil affects the jurisdiction of the Court which might have occasion to consider questions arising out of the marriage contract, but does not alter the terms or conditions of the contract itself, and those are governed by the *lex loci contractus*, in this instance by the law of England, for there is nothing to show that when Dr. Mir-Anwaruddin married Ruby Hudd either he or she intended that the ceremony should confer upon her anything other than the status which the English law gives to a Christian wife, whether married in a registry office or in a cathedral church."

In the case of *Chetti v. Chetti*[20] a Hindu domiciled in India married an English woman at a Registrar's office in London and this marriage was held to be a valid one. The husband had attacked the validity of the marriage on the ground that by reason of his religion which was also his personal law it was one which he was incapable of contracting. Sir Gorell Barnes P. held (at page 78):—

"There is not, in truth, a disability by the laws of his domicil which cannot be got rid of at the will of the respondent, and there seems to be no status, of which notice can be taken in this country, creating an incapacity to enter into a marriage contract in this country.";

and ultimately dealt with the case in the following passage (at page 87):—

"Ought a foreigner domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our Courts to support such an assertion and repudiation, with the consequent effects on the position of the wife and legitimacy of the child? To my mind the answer should be 'No.'"

The case of *Bethell v. Hildyard, supra* was a case where a domiciled Englishman residing in Bechuanaland went through a ceremony of marriage with a woman of the Baralong tribe the customs of which allow polygamy. Stirling J. held that this was not a valid Christian marriage in the eyes of the law of England but he did not say that it was invalid as a marriage of the sort recognized among the Baralongs. What he said was this:—

"The evidence clearly proves that Christopher Bethell intended that the relationship between himself and Teepoo should at least be that of husband and wife in the sense in which those terms are used among the Baralongs. That relationship, however, is essentially different from that which bears the same name in Christendom, for the Baralong husband is at liberty to take more than one wife; and it must therefore be determined whether the union between Christopher Bethell and Teepoo was a marriage in the Christian or merely in the Baralong sense. In my opinion the latter alternative is the conclusion to be arrived at upon the evidence before me."

His Lordship clearly based himself on the question of intention for later he observed:—

"I think that the proper inference is that he meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage."

In the case of *Risk v. Risk*[21] a woman who was domiciled in England went to Egypt and there married by Muslim rites an Egyptian Muslim domiciled in Egypt. Barnard J. said:—

"I am satisfied that she realised it was a ceremony of marriage according to Moslem rites and that those rites permit of other wives. The wife entered into this marriage contract with a full knowledge of its polygamous character, and now on that very ground she seeks to have it set aside"

and went on to quote the words of Lord Penzance in *Hyde v. Hyde, supra*:—

"Is this Court, then, justified in thus departing from the compact made by the parties themselves?"

The case of *Maher v. Maher*[22] was in its essential the same as that of *Mir-Anwaruddin supra*. An Egyptian Muslim domiciled in Egypt married a Christian woman domiciled in England at the Cambridge Registry Office and subsequently purported to divorce her in Egypt according to Muslim rites. It was held on the wife's subsequent petition for divorce that the marriage had not been dissolved by the

purported Egyptian divorce and was one in respect of which the Court had jurisdiction. The matter was thus concluded by Barnard J. :—

"The marriage between the wife and the husband was a civil marriage pursuant to the Marriage Acts, 1811 to 1939, which laid down certain regulations for the contracting of monogamous marriages. It was a marriage in the Christian sense and cannot be dissolved by a method of divorce which is appropriate to a polygamous union. I, therefore, find that the marriage solemnized between the wife and the husband is a valid and subsisting marriage, the Mohammedan divorce being inappropriate to such a union."

Warrender v. Warrender, supra would seem to lead to an opposite result. In that case, the husband who was domiciled in Scotland married an English woman in England at a time when the law of England regarded marriage as indissoluble whereas in Scotland divorce could be had on the ground of adultery. The husband sued for divorce in Scotland and it was held by the House of Lords that the Scottish Courts had jurisdiction to entertain the suit. In other words, on the face of it the English marriage conferred upon the wife the status of a married woman for the duration of the joint lives of her husband and herself whereas in effect the husband was permitted by the law of his domicile to substitute a status which while it lasted was the same but which was of lesser duration, that is to say, not for the joint lives but until it was terminated by the Court. It is to be remembered, however, that in spite of the attention which it has attracted from English Judges and from writers of text books, this case was a purely Scottish one and the House of Lords was sitting as a Scottish and not as an English Court of Appeal. It is true that Lord Brougham, who had practised at the Scottish Bar before he went to England, based himself to some extent on the distinction between the incidents and the essence of a contract which has attracted so much later attention but he based himself equally strongly on what was, at any rate until 1937, the conception of the law of Scotland that adultery was something *quasi* criminal and divorce was not a remedy given to an injured party but a punishment inflicted upon crime. Lord Lyndhurst based himself entirely on a series of decided Scottish cases and it is at least possible that he would have decided the matter otherwise had he been dealing with the law of England.

Returning to the present case I think it is clear that since 1st January, 1941, in Penang there are three different ways in which it is open to a man of Chinese race to enter into a marriage which will be recognized by the law. He may marry under Chinese custom. Or he may marry under the provisions of the Civil Marriage Ordinance. Or he may marry under the provisions of the Christian Marriage Ordinance. In the eyes of the law he has complete freedom of election. It is true that on the face of it he may only marry under the Christian Marriage Ordinance if he or his wife is a Christian but for the purposes of that Ordinance a Christian is defined as "a person professing the Christian religion." It is not for a Court of Law to speculate on the theological question of how far the adoption of any religion can ever be voluntary. Here the test which the law applies is "profession" and I think as far as the law is concerned "profession" must be taken as a matter of completely free choice. Whether the profession be genuine or not may well have to be determined in individual cases but that is beside the point.

The point is that a Chinese man in the Straits Settlements has his choice of the three forms of marriage and by the ordinary rule of law once he exercises his power of choice he must be held to have intended the consequences which the law attaches to what he has done.

What are these consequences?

If he marries under Chinese custom the main consequence is that he confers upon his wife no higher status than is conferred upon a wife by Chinese custom as regarded by the Court in Penang, a status which in particular may involve a sharing of the *consortium* with another wife. And, with all respect to the views of Brown J. as expressed in *Rex v. Teo Kim Choon supra,* such a marriage will be perfectly valid and such will be one of its consequences irrespective of whether either of the parties professes the Christian religion. (See *Chia Teck Leong's* case *supra*).

If he marries under the Civil Marriage Ordinance then it is clear from the provisions contained in that Ordinance that he acquires and confers upon his wife the status of parties to a monogamous marriage with all the rights and liabilities which the law attaches to such a status during the continuance of the marriage. Any party who contracts such a civil marriage and who is already married under any law or religion custom or usage is guilty of bigamy. (See section 5(2)). A person contracting such a civil marriage cannot contract a valid marriage of any sort with any other person during its continuance and if he or she purports to do so is guilty of bigamy. (See sections 4 and 5(1)). No union by a man with another woman during the continuance of such a civil marriage can confer the status of legitimacy or any right of succession on its off-spring. (See section 6).

With regard to marriage under the Christian Marriage Ordinance two preliminary points require to be borne in mind. The first is that marriage under that Ordinance is a perfectly lawful form of marriage always provided one of the parties professes the

Christian religion. It is a form of marriage which the State by statute has made available to all such parties and there is nothing in it (as there was in section 71 of the earlier Ordinance) which debars any person from taking advantage of it on the ground of his personal law. The second is that, on the other hand, as has been seen it is not the only lawful marriage which is permissible.

Under the Ordinance a marriage may only be solemnized by a person who has received episcopal ordination, by a clergyman of the Church of Scotland, by a minister of the Presbyterian Church of England or by a minister of religion licensed under the Ordinance by the Governor to solemnize marriages. In the case of episcopally ordined persons and Church of Scotland ministers the marriage must be solemnized "according to rules, rites, ceremonies and customs" of the Church of which the person celebrating the marriage is a minister (section 6). In the case of other ministers the form may be such as the minister thinks fit to adopt provided that in some part of the ceremony both parties must declare that they know of "no lawful impediment why they should not be joined together in matrimony" and each must say to the other "I,.....do take thee.....to be my lawful wedded wife (or husband)".

This is not the place to discuss the historical question of how far monogamous marriage is an essential part of the doctrine of the Christian religion or how far it may be a later importation based on the Roman Law. In modern times, however, it is inconceivable that any episcopally ordained minister or minister of the Church of Scotland or the Presbyterian Church of England or any minister of religion licensed by the Governor of the Straits Settlements would solemnize any marriage unless satisfied that the parties were in a position to contract a monogamous marriage and had the present intention of doing so. And it is inconceivable that two parties, who were perfectly free to contract a valid marriage in another way, would have their marriage solemnized in that particular way unless they were agreed to enter into a monogamous union and to confer each upon the other the status of a married woman and a married man as these terms are understood in relation to a monogamous union and in particular as conferring upon each the right to the exclusive *consortium* of the other. It seems to me that in every case the fact of going through such a form of marriage would give rise to the inference that such was the intention of the parties and I find it difficult to imagine any circumstances in which such an inference could be successfully rebutted.

It is the agreement between the parties that matters. I am not concerned here with questions of capacity. The converse of a universal proposition is not another universal proposition but a particular proposition. The converse of the proposition that all men are animals is not that all animals are men but that some animals are men. Similarly, the fact that a man's personal law permits him to enter into polygamous unions does not necessarily mean that he cannot contract one which at any rate at its inception is monogamous. Nor does the fact that his personal law restricts him to a monogamous union prevent him from entering into a polygamous union provided the law of the *locus actus* permits it. He can do anything the law does not prohibit. So long as he does nothing that the law of the *locus actus* forbids he can agree to confer and can confer upon his wife the status of a monogamous wife or that of a polygamous wife. Bethell chose to marry his wife according to the tribal custom of the Baralong people rather than take her to Cape Town and marry her there according to Christian rites and thus she acquired no higher status than that of a polygamous wife. Dr. Mir-Anwaruddin did not marry his wife as he might have done according to Muslim rites in the Woking Mosque, he married her in the Hammersmith Registry Office under the English statute. And so it was held that he conferred upon her the status of a monogamous wife. Similarly Mr. Maher married his wife in the Cambridge Registry Office and in spite of his religion and his Egyptian domicile the marriage was held to be a monogamous one. Mrs. Risk was not sufficiently prudent to insist on her husband, another Muslim domiciled in Egypt, following the same course. She went to Egypt and was married to him there according to Muslim rites and the marriage was held to be polygamous.

Here I would quote certain observations by Barnard J. in the case of *Mehta v. Mehta, supra.* His Lordship referred to the possibility of a husband changing his religion and went on to say (at page 693);—

> "Does that possibility exclude this marriage from being a marriage in the Christian sense and one which this court can adjudicate upon in its matrimonial jurisdiction? I feel satisfied that all I have to do is to look at the inception of the marriage. It is perfectly clear that this marriage was monogamous in its inception and that monogamy was the essence of the contract into which these two parties entered; and I do not think that this court can look beyond that. It may well be that such a marriage, according to the laws of different countries, can be either got rid of or altered in accordance with those laws; all this court must consider is the marriage contract in its inception."

In the present case, I think it is clear that the parties intended and agreed to confer upon each other the status of parties to a monogamous marriage and that their marriage is to be regarded as monogamous. If this were not so, the petitioner would be prevented from asking for relief by reason of section 3 of the

Divorce Ordinance which provides that the Court shall give relief on the same principles as the Court in England gives relief in matrimonial proceedings, and it is well settled that in England the Divorce Court will not give any relief in respect of a polygamous marriage.

That, however, does not conclude the matter for the Petitioner still has to shew that the Straits Christian Marriage Ordinance of 1940 is a law "providing that or in contemplation of which marriage is monogamous."

As regards the question of whether the Ordinance provides that marriage under it is monogamous, I have nothing to say except that in my opinion it does not so provide.

As regards the question of whether it contemplates that marriage under it shall be monogamous, I have come though with some reluctance to the conclusion that it does. I find the expression "contemplate" predicated of a statute somewhat difficult to understand. It is not a common usage of the word and, indeed, I have been unable to find it in any other statute. If the marriage was to be monogamous in the contemplation of the parties to it the meaning would have been clear. It would have been safe to regard contemplation as being synonymous with intention. In all the circumstances of the case, however, I have come to the conclusion that I ought to take it that what is meant is a law enabling parties to enter into a marriage which they contemplate or intend shall be monogamous. I base this upon the conclusions at which I have already arrived that irrespective of any capacity which he may enjoy by reason of his personal law to enter into a polygamous marriage it is open to a man to enter into a monogamous one and that as the law stands in the Straits Settlements (or stood in 1941) it was possible for a party whose personal law permitted a polygamous marriage to enter into such a marriage lawfully and that therefore the only possible purpose of the Ordinance was to enable such persons if they chose to do so to contract a monogamous marriage according to Christian rites. I am, to some degree, fortified in this conclusion by the 1939 amendment to the Straits Settlements Divorce Ordinance which I have already discussed as I can discover no distinction in principle between the 1940 Christian Marriage Ordinance and the earlier one which it replaced. Prior to 1939 a Christian party to a marriage under that Ordinance was entitled to sue for divorce. And where there is doubt, as there is here, I think there is a case for invoking the principle that, if possible, legislation should be construed so as not to deprive persons of pre-existing rights. I am not, of course, applying that principle to the local Divorce Ordinance. I am, however, applying it to the Straits Ordinance because to my mind it is legitimate to look to that Ordinance for any light it may throw on the intentions of the Straits Settlements Legislature as to the interpretation it intended to be placed upon the Christian Marriage Ordinance.

I am also fortified in the view I have taken by the observations of Lord Merrivale P. in the case of *Peal v. Peal*[23] who described the Indian legislation as to Christian Marriage as providing for :—

". . . . the celebration of marriages not only for British Christians whose unions had been provided for by the older laws but for native Christians and for Christian subjects in India of foreign states — that is for various classes of persons governed by different systems or codes of personal law"

and by the following observation by Walsh J. relating to the same legislation in the case of *Emperor v. Maha Ram*[24] :—

"The legislation is not unlike the Foreign Marriages Act in England. The object of the Act is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians."

The Petitioner is accordingly granted *decree nisi* at three months and interim custody of the child of the marriage.

Petition granted.

PUBLIC PROSECUTOR v. PENANG MUNICIPAL SERVICES UNION & ORS.

[O. C. J. (Spenser Wilkinson J.) July 13, 1956]
[Penang — Originating Motion No. 25 of 1955]

Contempt of Court — Publication of comment upon pending proceedings — Whether it is necessary to constitute contempt that the comment must be on the actual issue before the Court — Discretion of Court to make order.

This was an application by the Public Prosecutor against the four respondents in respect of the alleged contempt of Court. The matter arose out of a summons case in the 1st Magistrate's Court in Penang in which one W. A. J. Hodgetts was charged with using abusive words to one Shariff bin Ahmad, a Municipal bus driver and with voluntarily causing hurt to the said Shariff bin Ahmad. The accused in those proceedings was acquitted on the 1st charge and on the 2nd charge the offence was found proved and he was bound over under section 183(2)(b) of the Settlements Criminal Procedure Code. An appeal was lodged against the decision of the learned Magistrate on the 2nd charge. Whilst this was pending there was published in the Straits Times newspaper an extract from a statement issued by the first respondents for publication in the press referring to certain questions in cross-examination and submissions by counsel in the course of the trial in the Magistrate's Court. It was submitted that the publication was not a contempt (i) that the article really contained nothing beyond what had already been stated in Court; (ii) that the case of **Re Sin Poh Amalgamated Ltd. & Ors.**[1] had ruled that comment may be made on matters other than the actual issue which is before the Court.

Held: (1) the publication was not merely a report of what happened in Court but contained comment upon what was said and there is ample authority for the presumption that the comment upon pending proceedings ought not to be indulged in, still less when that comment